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No. 09-505

In the Supreme Court of the United States

480.00 ACRES OF LAND AND GILBERT A. FORNATORA, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When it is alleged that the federal government has induced local authorities to increase regulation of property the United States then condemns, and the property owner seeks to have the regulation's effects disregarded under the "scope of the project" rule—under which changes in a property's value resulting from the project itself may not be considered in determining just compensation—must the owner show that the federal government's sole motive or primary purpose was to depress land value, or merely demonstrate a nexus between the regulation and the condemnation?

2. What standard governs due process claims under the Fifth Amendment, where a property owner alleges that the federal government has manipulated the Fed. R. Civ. P. 71.1 land commission process to artificially depress just compensation payments by denying an owner a meaningful opportunity to be heard?

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Among the Fifth Amendment's fundamental protections is the guarantee that no private property shall "be taken for public use, without just compensation." U.S. Const. amend. v. Under established principles of eminent domain, the "just compensation" for land acquired by condemnation is "the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984).

This case presents the important and recurring question of how to measure "just compensation" where the federal government, anticipating that it will be condemning land, induces local authorities to impose regulations on a property that depress its fair market value. It also presents the question of what standard governs a due process claim where, as here, the government appears to have manipulated the land valuation commission process in order to set an artificially low baseline valuation by moving unrepresented, *pro se* landowners to the front of the valuation line.

These questions call out for resolution by this Court. In order to introduce uniformity into the federal valuation process, Congress enacted Federal Rule of Civil Procedure 71.1, which establishes a sys-

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The NFIB Small Business Legal Center is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

tem of federal land valuation commissions. But, as shown in petitioners' brief and below, the legal standards under which these commissions (and their state counterparts) operate are in disarray. Courts in different circuits apply different tests to determine whether locally-imposed regulations are part of the scope of the federal project, and thus excluded in determining fair market value. And no nationally-accepted standard has evolved for determining when the government's manipulation of the commission process amounts to a denial of due process.

These inconsistencies are a matter of national concern; they affect hundreds of millions of dollars of condemned property valuations each year. And the burden of these inconsistencies falls largely on individuals and small business owners, many of whom appear before valuation commissions without legal representation.

Amicus National Federation of Independent Business Small Business Legal Center ("NFIB Small Business Legal Center") has a vital interest in this Court's resolution of the questions presented. The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). Founded in 1943, the NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. NFIB represents about 350,000 businesses throughout the country; its membership includes single-person enterprises, family farms, retailers, and manufacturing firms. Its mission is to promote and protect the right of its members to own, operate, and grow their businesses.

One important function of the NFIB Small Business Legal Center is to represent the interests of small business owners in potentially precedent-setting cases. Since its launch in 2000, the Legal Center has filed over 100 *amicus* briefs in state and federal courts.

The NFIB Small Business Legal Center is acutely aware that the most valuable asset that many small business owners have is the real property on which their businesses are located. Eminent domain forces small businesses to relinquish this asset without full compensation for subjective, but nevertheless substantial, harms—including relocation expenses, business goodwill, legal expenses, and the cost of replacing condemned property. Losses related to condemnation and undervaluation impose special hardships on small businesses, which may be unable to reopen or may fail in a new location.

The NFIB Small Business Legal Center thus seeks rules that will protect even *pro se* small business condemnees from government manipulation of fair market value compensation—either through manipulation of local regulations in advance of condemnation, or through the gaming of the commission process to artificially depress valuations.

STATEMENT

This case concerns the federal government's condemnation of 480 acres of petitioner Gilbert Fornatora's property, which was located adjacent to Everglades National Park. In anticipation of expanding the national parkland, the federal government recommended to local authorities that they restrict zoning to one dwelling per forty acres in Fornatora's and other abutting land. In 1981, Dade County, Florida authorities enacted this recommendation, which substantially decreased the market value of that land. In 1989, Congress authorized the expansion of Everglades National Park to include petitioner's property (along with 2,700 other parcels), and some years later, a land commission was appointed pursuant to Fed. R. Civ. P. 77.1 to determine the just compensation due to the dispossessed land owners.

Fornatora raised several objections to the valuation process both before the district court and on appeal to the U.S. Court of Appeals for the Eleventh Circuit. First, he argued that the commission had erred in refusing to apply the so-called "scope of the project" rule, which holds that project-influenced decreases in property values should not be included in valuation. The courts below rejected this argument, holding that unless Fornatora could show that the "primary purpose" behind the local zoning restrictions was to depress his property's value in advance of condemnation, the scope of the project rule did not apply.

Second, Fornatora objected to the apparent manipulation of the commission process by the government in order to artificially depress valuations. Specifically, he pointed to a repeated practice of dismiss-

ing properties from commission hearings where their owners were represented by counsel, and later reinstituting proceedings only after enough *pro se* cases had been heard to establish a lower valuation pattern. In effect, the government used unrepresented owners to establish the baseline valuation against which contested properties would be measured. The Eleventh Circuit rejected this claim without adopting any definite due process standard, but rather finding that in light of similar fact patterns in other cases, the proceedings were sufficient to "facilitate justice."

ARGUMENT

1. As this Court has recognized, "'[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat * * * (of the construction of a government project) and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned." *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (citation omitted). This case involves the application of that principle to a fact pattern that has split the lower courts: the federal government's inducement of land-use regulation by local authorities in anticipation of a federal taking.

Courts and commentators have long recognized the problem of "condemnation blight":

> "[I]n some cases, government functionaries have been known to engage in a process of 'softening up' owners of properties slated for acquisition. * * * [C]ities have been known to withhold trash pickup and police protection from the targeted areas. Short of that, it is common that building permits are withheld causing the targeted properties to fall into dis-

> repair, so that cities can acquire them cheaply. Or, zoning may be changed so as to lower property values in anticipation of condemnation."

Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47, 59–60 (1998). See also, *e.g.*, *Amen* v. *City of Dearborn*, 718 F.2d 789, 795 (6th Cir. 1983) (detailing local government's manipulation of zoning and permitting processes to artificially depress market values in anticipation of contemplated taking).

This Court's response to this problem was to adopt the scope of the project rule, which excludes from the "just compensation" calculation any change in value that was caused by the government's own conduct in connection with the condemnation project. *See, e.g., Virginia Elec. & Power, supra.* However, the Court has never explicated the standard to be applied to determine when federally-induced local regulations that diminish a property's fair market value should be considered to be within the scope of a federal project for valuation purposes.

As set forth in detail in petitioners' brief, this has resulted in non-uniform treatment of takings claims across federal jurisdictions. Compare, *e.g.*, *United States* v. *480.00 Acres of Land*, 557 F.3d 1297, 1310–1311 (11th Cir. 2009) (requiring showing that government's "primary purpose or motive" in enacting regulations was to depress property values in anticipation of condemnation), *United States* v. *Land*, 212 F.3d 830, 832 (5th Cir. 2000) (same), and *United States* v. *Meadow Brook Club*, 259 F.2d 41, 45 (2d Cir. 1958) (requiring showing that government's "sole motive" was to depress values), *with United States* v.

222.0 Acres of Land, 324 F. Supp. 1170, 1175 (D. Md. 1971) ("inducement" of regulation by federal government enough to bring it within scope of project rule) and *United States v. Certain Lands in Truro*, 476 F. Supp. 1031, 1032 (D. Mass. 1979) (regulations "motivated" and "induced" by federal government are within scope of project rule).

Similarly, state courts—which operate under the same constitutional takings and just compensation restraints as their federal counterparts, see *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1896) (incorporating Fifth Amendment's takings clause against the States)—apply widely disparate standards to determine whether particular regulations fall within the scope of the project rule. For example, in *Roth* v. *State Highway Commission*, 688 S.W.2d 775, 777–778 (Mo. App. 1985), the state court, construing Missouri's analogous takings clause, held that the State's collusion with local authorities to deny building permits on land it sought to condemn was "untoward activity" that should have been accounted for in the condemnation proceeding. In *City of Sparks* v. *Armstrong*, 748 P.2d 7, 8–9 (Nev. 1987), the Nevada Supreme Court held that a local government's precondemnation restrictions on the use of a targeted property should be excluded from valuation because those restrictions were "unreasonable or oppressive in such a manner that those activities adversely affect[ed] the market value of the property."

In *Jones* v. *People ex rel. Department of Transportation*, 583 P.2d 165, 169–170 (Cal. 1978), the California Supreme Court ruled for the property owner in an inverse condemnation action, holding that the reduction in value caused by local authorities' prohibition of subdivision in advance of an anticipated

state condemnation was compensable because it was "unreasonable conduct." And in *Lange* v. *State*, 547 P.2d 282, 287–288 (Wash. 1976), the Washington Supreme Court applied the scope of the project rule to exclude the diminution in value caused by the government's announcement of a plan to build a highway near the targeted property, where such reduction was "clearly foreseeable."

The split that petitioners have shown—as well as the widely varying standards employed by state courts—is more than simply a variation in verbal formulation. The "primary motive" test adopted by the Eleventh Circuit and some of its sister circuits is not just strict in theory; in most cases, it will be fatal in fact to landowners' claims. Especially given the limited procedural protections and mechanisms for discovery that attend a valuation commission proceeding under Fed. R. Civ. P. 71.1, it will be a rare case indeed where a condemnee will be able to produce a "smoking gun" showing that the government's expressed benign motives are wholly pretextual.

As the Eleventh Circuit itself recognized below, "[i]t is very unlikely that the Government would ever admit that its primary purpose or motive in passing an ordinance or regulation was to depress value in anticipation of condemnation." 557 F.3d at 1314; see also *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (improper motives of local land-use regulators must be inferred, because they are not likely to be openly asserted by the government). If government collusion and manipulation is shielded by such a difficult-to-overcome standard, property owners will face the "heightened risk that the purpose" of pre-condemnation regulation will be "avoidance of the

compensation requirement, rather than the stated police power objective." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

The fact that petitioners have demonstrated a landscape of conflicting standards rather than a crisp, black-and-white split should not deter this Court from granting certiorari. To the contrary, the patchwork quilt of inconsistent standards on the state and federal levels calls out for uniformity both as a matter of constitutional principle and Congressional policy. See *United States* v. *5.00 Acres of Land*, 673 F.2d 1244, 1247 (11th Cir. 1982) (valuation commission procedure was intended to "achieve some uniformity of result" in cases involving "large areas [of land] held by many small landowners").

Moreover, the number of reported Court of Appeals decisions on this issue understates the importance of this question. If fewer cases than might be expected have reached the Courts of Appeals, it is likely because of the prevalence of *pro se* representation among those hailed before land valuation commissions. That fact counsels in favor of searching review to ensure uniformity and fairness.

Finally, the proper construction of the scope of the project rule is a question of nationwide importance. Each year, thousands of condemnation projects at the federal and state levels result in total just compensation payments of billions of dollars. Moreover, the fact pattern in this case—the enactment of local regulations at the behest of federal authorities that are intended, at least in part, to depress land values in anticipation of a federal taking—is a recurring one. As land use regulation becomes more pervasive, and coordination between govern-

mental authorities increases, such situations will only become more commonplace. The lack of a clear and uniform standard by which to apply the scope of the project rule will only encourage further governmental gamesmanship and place the Constitution's protection of private property in greater jeopardy.

2. The second question presented by the petition—the proper due process standard to apply to a claim of governmental manipulation of the land commission process established by Fed. R. Civ. P. 71.1—is also worthy of this Court's review.

Case law has long held that courts have a duty to ensure that owners of condemned property receive a meaningful hearing into the values of their individual parcels. See, *e.g.*, *Gwathmey* v. *United States*, 215 F.2d 148, 153 (5th Cir. 1954). Indeed, given the lack of procedural protections inherent in the commission process (for example, the lack of a right to a jury trial), courts have emphasized their duty to be "particularly vigilant" to ensure that the rights of landowners are not diluted. *5.00 Acres*, 673 F.2d at 1247. Such procedural vigilance is particularly important given both the limited resources available to many individuals and small business owners facing condemnation, and the prevalence of *pro se* representation before land valuation commissions.

But vigilance is worthless if there is no agreement among the courts as to what standard of review should control their inquiries. The case below dramatically illustrates this problem. Despite a multipage analysis of the facts of this case, the Eleventh Circuit was unable to enunciate any coherent principle for determining whether the federal government's "front-loading" of unrepresented cases in order

to establish an artificially low valuation baseline offended due process. To the extent that other courts have addressed this issue, they too have failed to formulate any uniform standard.

The power of condemnation is one of the federal government's most dangerous and can be susceptible to abuse. As this Court has recognized, there is a fine line between a legitimate regulation of property and "out-and-out extortion" designed to depress the value of land in anticipation of a taking. *Nollan*, 483 U.S. at 837. Without clear and uniform procedural standards in place that permit courts to exercise the "particular vigilance" required to protect property owners' rights, that line will continue to be blurred.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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